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IN THE

Supreme Court of the United States

October Term, 1956

No. 37

ALLEN I. NILVA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

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September 27, 1956

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (S.R. 72)[1] is reported at 227 F. 2d 74. The opinion of that court on the denial of the petition for

[1] The record before this Court is divided into two portions with different paginations. The record compiled at the contempt hearing in the District Court consists of the first 107 pages and is referred to throughout this brief as "R." The supplementary record, filed in the Court of Appeals by the Government, consists of 68 pages and has its own pagination. This supplementary record is referred to in this brief as "S.R." The proceedings in the Court of Appeals, including the opinions of that Court, are printed immediately following the supplementary record and utilize its pagination. Thus all references to the opinions of that Court are to "S.R."

rehearing (S.R. 99) is reported at 228 F. 2d 134. A memorandum opinion of the District Court (S.R. 48) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955, (S.R. 82), and a petition for rehearing was denied on December 21, 1955 (S.R. 100). On January 16, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956 (S.R. 101). The petition for a writ of certiorari was filed on February 17, 1956, and was granted on April 2, 1956. 350 U.S. 1005. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a criminal contempt conviction under Rule 42(b) of the Federal Rules of Criminal Procedure can be premised exclusively on prior testimony not introduced at the contempt hearing and not subject to cross-examination by counsel for the accused.

2. Whether Rule 42(a) of the Federal Rules of Criminal Procedure is applicable where the testimony before the court on the contumacious acts relates to events occurring outside the courtroom and whether, in any event, the applicability of Rule 42(a) can be used to narrow the rights accruing to a defendant in a proceeding instituted under Rule 42(b).

3. Whether petitioner's conviction for contempt can be sustained in the absence of any competent evidence establishing guilt beyond a reasonable doubt.

4. Whether other errors were committed in the proceedings below which warrant reversal or reconsideration of the conviction.

STATUTE AND RULES INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

> Rule 17. Subpoena.
>
> * * * * *
>
> (c) For Production of Documentary Evidence And Of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or

portions thereof to be inspected by the parties and their attorneys.

* * * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

* * * * *

Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding

of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 27, 1954, the United States District Court for the District of North Dakota found the petitioner, an attorney, guilty of criminal contempt (R. 67). The acts constituting such contempt, the court further found, "did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was thereupon sentenced to imprisonment for a year and a day (R. 67). On appeal, the conviction was affirmed by the Court of Appeals for the Eighth Circuit (S.R. 82), 227 F. 2d 74, and a rehearing petition was denied on the basis of a written opinion (S.R. 99), 228 F. 2d 134.

This contempt proceeding had its origins in the retrial of Christianson and Paster on charges of conspiring to violate the Act of Congress of January 2, 1951, known as the Johnson Act (15 U.S.C. 1171-1177).[2] This Act prohibits the interstate shipment of gambling devices. In preparation for the retrial, which began on March 29, 1954, the District Court, at the request of the Government, issued two subpoenas duces tecum. They were directed to the Mayflower Distributing Co. of St. Paul, Minn., a corporation wholly owned by Paster. Subpoena No. 78 was issued on February 26, 1954 (R. 26) and Subpoena No. 160 was issued on March 22, 1954 (R. 24). Both required that the corporation produce at the retrial certain books

[2] At the first trial, the jury had been unable to agree as to the guilt of Christianson and Paster and a mistrial was declared. Petitioner Nilva was acquitted at this first trial and hence was not involved in the retrial.

and records reflecting the purchase and sale of new and used coin-operated or gambling devices (R. 24-27). They were returnable March 29, 1954, the date set for the retrial. Service of the subpoenas was effected in both instances on Walter D. Johnson, Secretary-Treasurer of the Mayflower Distributing Co. (R. 25, 28).

The Court of Appeals noted that the subpoenaed records were not produced on March 29, the return date. Instead, the defendant Paster moved on that day to quash the subpoenas as violative of his privilege against self-incrimination (S.R. 21). This motion was denied (S.R. 25). The Government thereupon orally moved, under Rule 17 (c) of the Federal Rules of Criminal Procedure, that the books and records designated in the subpoenas be produced forthwith and the court so ordered (S.R. 27). Counsel for the defendant Paster indicated that the order would be obeyed (S.R. 26) and several days later, when Government counsel inquired as to when the records would be produced, Paster's counsel stated that this would be done the following day, April 1 (R. 5).

On April 1, 1954, the third day of the Christianson-Paster retrial, petitioner, who was an attorney and vice-president of the Mayflower Distributing Co., voluntarily appeared in answer to the two subpoenas and the forthwith order (R. 8-9). He did so after being requested by Johnson, the secretary-treasurer of the corporation, to compile the requested documents (R. 41, S.R. 40). An informal conference was held on that day in the trial judge's chambers (R. 5). Government counsel indicated the belief that petitioner had not produced all the subpoenaed records; what was produced related only to new machines and not to used

machines (R. 6). Petitioner was thereupon put under oath and examined by Government counsel (R. 5). He testified that he was the vice-president of the Mayflower Distributing Co. (R. 8) and that he had "brought all the records that (he) could that those subpoenas asked for" (R. 9). He testified further (R. 9) to the effect that many of the requested records had been subpoenaed for use in another criminal proceeding then pending before the Court of Appeals for the Eighth Circuit.[3] And he stated that he was but a nominal officer of the corporation and was not the best qualified to testify as to the bookkeeping records (R. 11).

Petitioner also described the magnitude of the task of attempting to comply with subpoenas of such breadth through a search of "thousands" of records (R. 17-19). He readily admitted that he may not have examined daily ledgers and he declined to state that he had examined monthly journals (R. 17). He unhesitatingly acknowledged that purchases of new equipment would be shown in running accounts rendered by the manufacturers from whom such purchases were made, and that records of such accounts could easily be found among Mayflower's records (R. 20). But he never suggested that such accounts and records had been produced. Moreover, petitioner made it clear that he had not personally conducted the entire search but had been assisted by office employees (R. 9, 15, 17). He expressly denied any knowledge of bookkeeping methods or of the contents of specific records (R. 9, 10, 17, 19). Repeatedly he refused to respond categorically to questions as to the contents of corporate records and he qualified his answers as to the research

[3] *Nilva* v. *United States*, 212 F. 2d 115 (C.A. 8), cert. den., 348 U.S. 825. The appellant in that case was Samuel George Nilva, not the petitioner in the instant proceeding.

he had made as being thorough "to the best of my ability" (R. 14, 15, 16, 18). Nowhere did he claim to have produced any specific records other than "compiled" records relating to used machines and all "incoming invoices" for certain months relating to new machines (R. 8, 18).

The trial judge later stated (S.R. 48)[4] that at its conclusion he had considered petitioner's testimony at this April 1 hearing to be evasive and accordingly he had granted the Government's request for an order impounding all records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn. The records thus impounded, according to the contested supplementary record (S.R. 34), consisted of "thousands and thousands of documents" filling more than a "post office truckful". On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). And on April 8 the Government asked for and received a recess of one day in the Christianson-Paster retrial in order that these documents might be further examined and analyzed (S.R. 35).

The Christianson-Paster retrial proceedings resumed and, on April 12, 1954, one Richard N. Peterson, an F. B. I. agent, "testified from a memorandum he made from the impounded records which showed the slot machines purchased by the Mayflower Company during

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[4] This statement was made in the judge's memorandum opinion denying the motion for suspension of the sentence, an opinion which was rendered after the entry of the contempt judgment and which appears in the contested supplementary record (S.R. 48-50). It has been held that an opinion announced after the verdict is rendered which states merely the course of reasoning which conducted the court to its judgment "may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record." *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 118.

the period inquired of Nilva about on April 1, 1954" (227 F. 2d at 77; S.R. 76). He testified further as to the sales of slot machines by Mayflower during the period in question which were revealed by the impounded records. There was also testimony at the retrial by one James Christensen, a former bookkeeper of the Mayflower Distributing Co., to the effect that certain ledger sheets were incomplete and that under instructions from petitioner, prior to the first trial, he had removed certain invoices and replaced them with slips of paper (S.R. 36-37). Those slips of paper were assertedly found among the impounded records.

On April 15, 1954, petitioner voluntarily appeared before the trial judge in chambers (S.R. 39). The judge ordered him not to leave the court's jurisdiction without permission and petitioner replied that he would "be pleased to comply with the order" (S.R. 39). Petitioner was then ordered to produce the records that he had previously brought in answer to the two subpoenas (S.R. 43). After petitioner stated that he was not seeking to assert any legal technicalities and didn't need any lawyer to represent him, the court repeated its order to refrain from leaving its jurisdiction without permission (S.R. 44). The court also warned those in the room not to report anything with reference to these proceedings or to the order enjoining petitioner from leaving the jurisdiction without permission so that the matters would not get in the newspapers or come to the attention of the jury (S.R. 44). At no point, however, was petitioner specifically told or warned that he was to be subjected to a contempt citation. The court later remarked (R. 34-35), however, that "Nilva was well aware of the fact that a proceeding of this type was contemplated because

he was ordered to remain within the jurisdiction of the Court until that case was over with and at that time he did state in chambers that he was an attorney and he did not need an attorney to represent him. The only reason the proceedings did not go forth at that time was because I feared it might affect the jury before whom we were trying the preceding case."

In the subsequent words of the trial judge (S.R. 48-49): "Action on the matter was deferred until after the jury verdict in the case of *U. S.* v. *Christianson, et al;* because it was the Court's desire that the jury should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way. There was no doubt that the jurors were not only aware of Nilva's close connection with one of the defendants but also, due to widespread public interest in the trial, were aware of the fact that Nilva had at one time been a co-defendant in the case and had been found not guilty in a previous trial thereof".

Christianson and Paster were found guilty of the alleged conspiracy on April 22, 1954 (S.R. 20).[5] On the following day, April 23, 1954, the court pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure issued an order to show cause (R. 2-4) why petitioner should not be held in criminal contempt for obstructing the administration of justice by:

(1) Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Co., subpoenas duces tecum

[5] The conviction of Christianson and Paster was affirmed on appeal by the Court of Appeals for the Eighth Circuit. *Christianson* v. *United States*, 226 F. 2d 646. This Court denied certiorari. 350 U.S. 994.

directed to that company in the Christianson-Paster criminal case.

(2) Disobedience to subpoena duces tecum No. 78, in that five named articles were not produced as required thereby.

(3) Disobedience to subpoena duces tecum No. 160, and disobedience to the court order made on March 29, 1954, in that twenty-two named items were not produced as required thereby.

The order, which was issued on Friday, April 23, 1954, was returnable on Tuesday, April 27, at 10 A. M. (R. 2). At the hearing on the morning of April 27, the court stated to petitioner's counsel that "This being an order to show cause . . . I believe the burden is on you to proceed" (R. 29). Petitioner's counsel asked for additional time (R. 29-30) in order to prepare a proper defense. It was explained that other commitments of counsel had prevented more than a brief contact with petitioner during the preceding four days, which included a week-end. The request for additional time was denied except to the extent that the matter was continued until 3 P. M. that same day. During the morning hearing, petitioner's request for a bill of particulars (R. 32, 36) as to the first specification of contempt—the giving of false and evasive testimony—was also refused (R. 36-37). It was ordered, however, that petitioner's counsel be given access during the short recess to all of the Mayflower records that had been impounded by the court (R. 35).

At the afternoon hearing, the transcript of petitioner's testimony of April 1, 1956, a copy of which he acknowledged receiving on April 16, was made part of the record in the contempt proceeding at petitioner's

request, together with subpoenas No. 78 and No. 160 (R. 38). Petitioner thereupon testified in his own behalf (R. 38-58), introduced fifteen exhibits, and was cross-examined by Government counsel (R. 62-67). Petitioner's testimony revealed that he was nominally a vice-president of Mayflower Distributing Co. and that, as an attorney, he handled minor legal matters, collection matters, contracts, purchases of real estate, leases and the like (R. 39-40). He was a brother-in-law of Herman Paster, the sole owner of the corporation (R. 40). The subpoenas, petitioner testified, had been served on Walter D. Johnson, the secretary-treasurer of the Mayflower Distributing Co. (R. 40-41). It had been understood that Johnson would compile the records demanded by the subpoenas and "it was his duty to comply therewith" (R. 41). Petitioner attempted to compile the requested records only after Johnson had left town to attend the conspiracy trial and phoned petitioner a few days before the return date (R. 41; S.R. 40), although petitioner previously had searched the records as well. (R. 42).

After petitioner testified that he was not an accountant and never did any accounting work (R. 43), the following colloquy took place between petitioner and his counsel concerning the first specification of contempt—his allegedly false and evasive testimony of April 1, 1954 (R. 44-45):

> A. Well I had no thoughts of any evasion of any kind. I had no ulterior motives or any ideas of any kind except to produce what I had brought and turn it over.
>
> Q. You were not reluctant to produce any records that were requested by the Court?
>
> A. No, sir.

Q. Did you at any time in the statement which was taken from you on April 1, 1954, in the Court's chambers refuse to produce any records which were requested of you?

A. No, sir, I did not.

Q. Was there any record specifically requested of you at that time which you had failed to bring?

A. I don't believe there was any particular item requested or any particular record requested that I refused to bring, sir.

Q. Did you knowingly make any false answer to the questions put to you, either by Government Counsel or by the Court at the hearing on April 1, 1954?

A. No, I did not, sir.

Q. Is it your position now that you made then no false answers to any questions which were asked of you?

A. It's my position that I made no false answers of any kind.

Q. If any answer you gave was incorrect, it was not done knowingly?

A. That is correct, sir.

As to the second specification of contempt—the alleged failure to produce five specific items under the terms of subpoena No. 78—petitioner testified (R. 54-58) that he had produced whatever he was able to find pursuant to that subpoena. The items he had produced in answer to the subpoena were introduced into the record of the contempt proceeding (R. 55-58). But no effort was ever made by the Government to produce the five specific items mentioned in the second specification of contempt. Nor was any proof introduced that such items were even in existence at the time subpoena No. 78 was issued and served.

With reference to the third specification of contempt—the alleged failure to produce twenty-two items

assertedly covered by subpoena No. 160—the items in question had presumably been impounded under the court order of April 1, 1954, and may have been among the many records physically present before the court at the contempt hearing. Petitioner admitted that he had not produced these items pursuant to the subpoena (R. 46-54) but testified as to particular items that he either couldn't find them during his search, or that he had brought all the records he could find and that he thought were required by the subpoena, or that he had not checked specific files that the subpoena had failed to mention by name (R. 46-54). Some of the records that he could not find had been "buried" in the basement so that not even the federal agents acting under the impounding order could find them without Paster's aid (R. 49, 52). He denied categorically (R. 58) that he intentionally or knowingly failed to produce any records called for by either subpoena.

Government counsel presented no witnesses and introduced no evidence at the contempt hearing apart from moving that the transcript of testimony of Richard N. Peterson, the F. B. I. agent, at the Christianson-Paster conspiracy trial (R. 68-100) be made a part of the contempt proceeding record (R. 59). Petitioner's counsel objected to the introduction of this transcript on the ground of hearsay and lack of opportunity to cross-examine Peterson (R. 59-61). The objection was overruled and the transcript was admitted (R. 61). In connection with this ruling the following colloquy took place (R. 60-61):

> Mr. Dibble (Government attorney): I think that it [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of

the record to establish the importance of the records that Mr. Nilva did not bring in.

The Court: Well, that seems proper to the Court. In fact, it seems to me that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt arose out of the respondent's actions in the case of *United States* v. *Christianson, et al.*

* * * * *

The Witness (Petitioner): Can I intercede, Your Honor? I was not present at any of the testimony of Mr. Peterson and none of his testimony was within my hearing.

Mr. Dibble: This is a proceeding to determine whether the respondent is in contempt of this Court and the thing that is material is the knowledge that the Court has in this proceeding and everything that is material which has come to the Court's attention I think can properly be made a part of this record. The Court would not be in a position to determine whether the contempt had been committed in the presence of the Court if the Court didn't take into consideration the record in the other case where the contempt was committed.

Mr. Graff (Petitioner's counsel): Certainly if that is the position of counsel, it isn't apparent from the Order to Show Cause which was issued by this Court. If I read it correctly—and I think I do—it has three specifications: 1, giving false and evasive testimony on April 1st; 2, disobedience to subpoena No. 78; 3, disobedience to subpoena No. 160. Now, that is the basis upon which we are in court, not the proceedings in the criminal case.

The Court: I think the record in this proceeding ought to disclose the fact that this respondent was an attorney of record for the defendant Paster in the case we have just completed trying. The objection is overruled.

> The Witness: Well, Your Honor, if I might intercede here, this is news to me that I was an attorney of record. If I was placed thereon, it was probably, I believe, at the very outset and I think one of the first motions and I thereafter withdrew and had no part in any of the proceedings whatsoever. I never sat at the counsel table. I never took part in any of the litigation.
>
> Mr. Graff: Mr. Nilva, I am quite sure that the Court appreciates that.

At the conclusion of petitioner's testimony, the court remarked (S.R. 45) that petitioner's record was not unblemished in that he had been a defendant in the first conspiracy trial and "had he been a defendant in the case as it was tried this time, I don't think he would have been so fortunate". The court thereupon found petitioner "guilty of criminal contempt as set forth in the Order to Show Cause insofar as the three specifications therein are concerned, and it specifically finds that the acts of the defendant which constitute criminal contempt did obstruct the administration of justice in the trial of the case of United States of America, plaintiff, against Elmo T. Christianson and Herman Paster" (R. 67). Petitioner was sentenced (R. 67) to imprisonment for a year and a day. It was also ordered, though not as a part of the sentence, that petitioner never again be allowed to practice in the District Court in North Dakota (R. 67).

The judgment and commitment of the court (R. insert page between p. 66 and p. 67) likewise found that petitioner had (1) given false and evasive testimony under oath on April 1, 1954, (2) disobeyed, without adequate excuse, subpoena duces tecum No. 78, and (3) disobeyed, without adequate excuse, subpoena duces tecum No. 160, and disobeyed, without adequate

excuse, the court order of March 29, 1954. It was found that "by each of the foregoing acts, petitioner had obstructed the administration of justice" and "WHEREFORE, it is adjudged that Allen I. Nilva is guilty of criminal contempt of the authority of this Court; and it is ORDERED that Allen I. Nilva is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of One (1) year and One (1) day."

Petitioner appealed to the Court of Appeals for the Eighth Circuit. In that court the Government filed a so-called Supplementary Record of some sixty-eight pages (S.R. 1-68) consisting almost exclusively of pleadings, orders, exhibits, transcripts of testimony and other proceedings in the record of the Christianson-Paster retrial. With the exception of certain excerpts from the testimony given in the District Court at the contempt hearing and the further exception of a list and summary of exhibits introduced at that hearing, none of the material presented in the Supplementary Record was a part of the record before the District Court in petitioner's contempt case. None of it was described in the official docket entries of the contempt case. And, with the exceptions just noted, none of the material in the Supplementary Record was incorporated as part of the record in the contempt case by any order of the District Court.

Petitioner filed in the Court of Appeals a motion to strike those portions of the Supplementary Record which had not been made a part of the record in the contempt proceeding before the District Court (R. 69-72). In its opinion affirming petitioner's conviction, the Court of Appeals denied this motion. S.R. 79, 227 F. 2d at 79, n. 2.

The Court of Appeals was unanimous in its action affirming the judgment of the District Court. S.R. 72, 227 F. 2d 74. It held that petitioner's conviction under Rule 42 (b) could be based exclusively on prior testimony given in the conspiracy trial and not introduced in the contempt proceeding since the petitioner was an attorney of record in the conspiracy case and could have cross-examined any witness in that case whose testimony was relevant to the contempt or he could have called such witness for cross-examination at the contempt hearing. In reaching this conclusion, the court relied in part upon material contained in the Supplementary Record which had not been introduced in the proceedings before the District Court.[6]

The Court of Appeals also issued an opinion denying a petition for rehearing filed by petitioner. S.R. 99, 228 F. 2d 134. In that opinion the court held that petitioner was in no position to complain about the use of the prior testimony given in the conspiracy trial since he could have been subject to the summary procedure of Rule 42 (a). The Court conceded (S.R. 100) that "if the conduct of Nilva, found to have been both contumacious and obstructive, had been committed outside the presence of the court, the introduction of the evidence of which Nilva complains would present a serious question." But since the court felt that the contempt occurred in the trial court's presence and that Rule 42 (a) could therefore have been applied, it concluded that petitioner could not object to the introduction of any evidence against him.

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[6] Thus the court stated (S.R. 76) that the willfulness of Nilva's testimony and his knowledge of Mayflower's records were shown by the testimony of James Christensen, testimony which appeared in the Supplementary Record (S.R. 36-37) but which was not introduced or even referred to at the contempt hearing.

SUMMARY OF ARGUMENT

Petitioner, having been cited for criminal contempt under the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, was entitled to all the due process protections explicit and implicit in that rule. Under that rule it was necessary that the criminal contempt proceeding be conducted as an independent proceeding, separate and apart from the original case out of which it may have arisen. All of the evidence upon which the prosecution seeks to overcome the presumption of innocence and to prove guilt beyond a reasonable doubt must be presented at the contempt hearing. Only in that way can the defendant be assured of the right to be confronted with the evidence and the witnesses against him and to cross-examine and refute such evidence. In this case, however, petitioner's conviction on all three specifications of contempt was premised exclusively on prior testimony and events not introduced or referred to at the contempt hearing and not subject to cross-examination at the contempt hearing by counsel for the petitioner. Due process in its most elemental form was denied petitioner.

Since the allegedly contumacious acts all occurred outside the presence of the trial court, the summary contempt procedures authorized by Rule 42(a) were inapplicable. In any event, the proceeding here was instituted exclusively pursuant to Rule 42(b) and the court below erred in holding that the due process elements that adhere to that rule could in any way be lessened by the applicability of a summary procedure that the trial court had elected not to pursue.

There was a complete absence of evidence to sustain the conviction of petitioner on any of the three specifications of criminal contempt. As to the first speci-

fication of having given false and evasive testimony, the record affirmatively shows that such testimony was not false or evasive and there is no evidence to the contrary. Moreover, there was no proof that such testimony—apart from the non-production of the records called for by the subpoenas—constituted an obstruction of justice. The testimony itself constituted no more than perjury, as to which a contempt prosecution will not lie. As to the second and third specifications of having failed to produce the records called for by the subpoenas, the record is devoid of proof that such records were actually in existence at the time the subpoenas were served, that they were readily accessible to petitioner or that they were within the intended reach of the subpoenas. Moreover, petitioner's testimony as to having made a good faith search for the records called for by the subpoenas constituted an "adequate excuse" for the non-production in view of the uncontested fact that he was a mere nominal officer of the corporation to which the subpoenas were directed and in view of the lack of proof that he was the custodian of the corporate records.

Other errors were committed which warrant reversal of the conviction below: (1) the Court of Appeals committed plain error in admitting and considering a supplementary record which had not been incorporated or introduced into the record before the trial court; (2) the trial court denied petitioner sufficient time in which to prepare his defense; (3) the trial court erred in admitting and considering a transcript of testimony that was secondary and explanatory only; (4) the subpoenas, in calling for the production of all documents relating to certain sales or individuals, without regard to whether such documents were relevant to the prose-

cution of a crime under the Johnson Act, were mere fishing expeditions which do not justify holding one in contempt for disobedience thereof; and (5) the trial court plainly abused its discretion in imposing a sentence of a year and a day under the circumstances of this case.

ARGUMENT

1. PETITIONER WAS DENIED THE DUE PROCESS RIGHTS GUARANTEED BY RULE 42(b)

The contempt proceeding against petitioner was non-summary in nature and was instituted exclusively under Rule 42(b) of the Federal Rules of Criminal Procedure (R. 2, 28). He was charged with and found guilty of three specifications of contempt. As to each of these three specifications, however, there was a glaring, patent failure by the District Court to observe the due process requirements of Rule 42(b). That failure was condoned and magnified by the Court of Appeals to an unwarrented and unprecedented degree. It therefore becomes appropriate, in the exercise of its supervisory power over proceedings in lower federal courts, for this Court to reverse the judgment below.

a. The impact of Rule 42(b) on this proceeding.

Rule 42(b) in substance provides that a criminal contempt shall be prosecuted, except in the circumstances to which Rule 42(a) is applicable, upon notice and hearing. A reasonable time must be allowed for the preparation of the defense and the notice must state and describe the essential facts constituting the criminal contempt charged.

Rule 42(b), as promulgated by this Court in 1944, is thus a codification of the due process requirements which the Court had long insisted upon in criminal

contempt proceedings. As stated in *Cooke* v. *United States,* 267 U.S. 517, 537: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, require that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

Moreover, the hearing contemplated by Rule 42(b) necessarily means a hearing in its fullest due process connotations. While due process of law is not a fixed concept unyielding as to time, place or circumstances, no consideration has yet justified itself which would in any way limit the application in non-summary contempt proceedings of all the deep-rooted demands of fair play enshrined in the concept of due process. The undoubted tendency has been, as noted in *Matusow* v. *United States,* 229 F. 2d 335, 345 (C.A. 5), "to observe, as far as may be, in the narrowly restricted area conceded to be covered by Rule 42(b), the protections given to defendants in criminal trials under the Bill of Rights." See *In re Michael,* 326 U.S. 224, 227.

Whether these due process elements are required as a matter of constitutional right under the Fifth or Sixth Amendment need not here be decided. Cf. *Blackmer* v. *United States,* 284 U.S. 421, 440; *Myers* v. *United States,* 264 U.S. 95, 104-105; *Merchants Stock & Grain Co.* v. *Board of Trade,* 201 F. 20, 28-29 (C.A. 8). It is enough that this Court is called upon to determine the nature of a hearing required by a procedural rule promulgated by it. And, in the exercise of its

supervisory power over lower federal courts, this Court is now charged only with the necessity of determining how contempt proceedings in those courts shall be fairly conducted within the confines of Rule 42(b). In such a context, the hearing contemplated by Rule 42(b) should be construed with "regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Morgan* v. *United States,* 304 U.S. 1, 19.

Rule 42(b), in other words, should be interpreted and applied so as to conform to "those fundamental requirements of fairness which are of the essence of due process." And for present purposes it is relevant to emphasize that fairness demands that a criminal contempt proceeding under that rule be conducted as an independent proceeding, separate and apart from the original cause out of which the contempt arose. *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 445, 451; *Michaelson* v. *United States,* 266 U.S. 42, 64-65; *Parker* v. *United States,* 153 F. 2d 66, 70 (C. A. 1); *Russell* v. *United States,* 86 F. 2d 389, 392 (C. A. 8); *United States* v. *Bittner,* 11 F. 2d 93, 95 (C. A. 4); *S. Anargyros* v. *Anargyros & Co.,* 191 F. 208, 210 (N.D. Cal.).

This complete separateness of a criminal contempt proceeding is of vital importance in assuring fairness to the contempt defendant. It is uniformly recognized that in such a proceeding "the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 444; *Michaelson* v. *United States,*

266 U.S. 42, 66. To insure that such substantial rights and constitutional privileges are respected it is manifestly necessary that the contempt proceeding not be intermingled in any way with the cause out of which the contempt arose. The record in the contempt proceeding must be complete in and of itself; all of the evidence upon which the prosecution seeks to overcome the presumption of innocence and to prove guilt beyond a reasonable doubt must be presented at the contempt hearing. Only in that way can the defendant be aware of all the evidence against him. And only in that way can he be assured of full opportunity to refute such evidence.

Thus a contempt defendant who is judged in whole or in part on the basis of a transcript of testimony introduced in some other proceeding or on the basis of the judge's memory of such testimony has not been accorded the basic rights which fairness and due process require. Such an intermingling of two separate proceedings deprives the defendant of the right to be confronted with and to cross-examine the witnesses whose testimony is being utilized to adjudge his contempt guilt. It deprives him of the right to a full and fair separate hearing on the contempt charges.

Leaving aside constitutional requirements, the basic elements of a full and fair hearing "include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence." *Carter* v. *Kubler,* 320 U.S. 243, 247. In the words of the court in *Powhatan Mining Co.* v. *Ickes,* 118 F. 2d 105, 109 (C.A. 6), "We are unable to see how there has been a full hearing unless the right to cross-examine has been afforded." The right to a hearing, in other words,

embraces not only the right to present evidence on one's behalf but also a reasonable opportunity to know the claims and the evidence of the prosecution and to meet them through the time-honored techniques of cross-examination and rebuttal. *Morgan* v. *United States,* 304 U.S. 1, 18. See also *Reilly* v. *Pincus,* 338 U.S. 269, 275; *Inland Steel Co.* v. *N.L.R.B.,* 109 F. 2d 9, 19-20 (C.A. 7); *Daily Review Corp.* v. *N.L.R.B.,* 192 F. 2d 269, 270 (C.A. 2).

This basic right to be confronted with and to cross-examine the witnesses against one has been recognized and applied in criminal contempt cases by this Court. Thus in *In re Oliver,* 333 U.S. 257, 273, where the accused had no opportunity to cross-examine adverse witnesses or to summon witnesses on his own behalf, this Court stated:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, *a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.* (Emphasis added).

And see *In re Murchison,* 349 U.S. 133, 134.

b. The violations of Rule 42(b) that occurred.

Tested by the foregoing principles, the conviction of petitioner cannot stand as to any of the three specifications. The Government has conceded in its brief in opposition to the grant of certiorari (p. 15) that "there may well have been a violation of the rule of confrontation" with respect to the first specification of contempt, the allegedly false and evasive testimony.

That much is admittedly true. And it is equally undeniable that as to all three specifications the trial was not conducted as an independent and separate criminal proceeding. Petitioner's conviction on all three specifications was premised exclusively on prior testimony and events not introduced or referred to at the contempt hearing and not subject to cross-examination at the contempt hearing by counsel for the petitioner. Due process in its most elemental form was denied petitioner.

The fact that petitioner's alleged contempt grew out of the prior Christianson-Paster criminal proceedings obviously made pertinent portions of those proceedings relevant to the contempt trial. Such items as the Christianson-Paster indictment, the impounding order, the order delaying the trial and petitioner's testimony under oath were all relevant and could have been introduced at the contempt hearing, though only as secondary evidence of the truth or falsity of his testimony. The trial judge said as much when he remarked that (R. 60), "it seems to me that in this [contempt] proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the respondent's actions in the case of *United States* v. *Christianson, et al.*"

But the relevance of the prior proceedings did not obviate the necessity, under Rule 42(b), of treating the contempt trial as an independent proceeding and introducing at that trial all the evidence against the petitioner in a form that would permit him to exercise his right of cross-examination and rebuttal. The Government's burden of proving petitioner's guilt as to all

three specifications beyond reasonable doubt was not satisfied either by relying upon the judge's personal knowledge of preceding events or by merely introducing transcripts of testimony by witnesses in the prior criminal trial. If the contempt hearing was to satisfy the requirement that it be a separate entity, from the standpoint of procedure and proof, it was incumbent upon the Government to prove all the incidents of the alleged contempt by proper proof at the contempt trial. Only in that way could petitioner's right to be confronted with and to cross-examine adverse witnesses and to rebut all such evidence have any real meaning.

Yet it is obvious that no serious attempt was made at the contempt trial to prove petitioner's guilt in a manner consistent with the due process requirements of Rule 42(b). The record made before the District Court at the contempt hearing consisted solely of the following elements:

1. The order to show cause (R. 2-4).

2. The transcript of petitioner's allegedly false and evasive testimony given on April 1, 1954 (R. 5-24).

3. The two subpoenas which petitioner allegedly disobeyed (R. 24-28).

4. The direct examination and cross-examination of petitioner at the contempt trial (R. 38-67). During the course of petitioner's direct examination, fifteen documents were introduced into the record (R. 59), eleven of them having been surrendered by petitioner on or about April 1 and the other four being documents that were seized under the impounding order.

5. The transcript of the testimony of Richard N. Peterson, an F. B. I. agent, on April 12, 1954, during

the course of the Christianson-Paster criminal trial (R. 68-100).

Thus no independent proof was offered by the Government that the petitioner was guilty of any of the three specifications of contempt. Nothing more was introduced by the Government than the transcript of the Peterson testimony, apparently in an effort to prove the falsity and evasiveness of petitioner's April 1 testimony. But this transcript was offered with no suggestion or demonstration that Peterson was for any reason unavailable as a live witness at the contempt hearing. Whatever relevance Peterson's testimony may have had did not eliminate the necessity of producing Peterson in person as a witness and permitting him to be cross-examined by petitioner's counsel. See *Motes* v. *United States*, 178 U.S. 458, 474.

The Court of Appeals sought to excuse the failure to produce Peterson by relying upon the fact that petitioner was an attorney of record for the defendant Paster at an early motion stage of the Christianson-Paster conspiracy proceeding. The court sought to impart significance to that fact by stating that, while petitioner did not participate in the conspiracy trial and did not sit at the counsel table, there was no reason why he could not have done so had he desired; thus he could have cross-examined Peterson at the conspiracy trial as Paster's attorney and accomplished as much as by cross-examining him at the contempt hearing. Moreover, said the court, petitioner could have called Peterson at the contempt hearing, along with the records, for the purpose of showing any inaccuracies in Peterson's summarization of them. S.R. 78, 227 F. 2d at 78. Thus by a curious perversion of the rule that a transcript of former testimony is inad-

missible in the absence of affirmative proof that the witness is dead or unavailable, the court held that the apparent availability of Peterson to petitioner made his prior testimony admissible.

But as the Government has candidly conceded in its brief opposing the grant of certiorari (pp. 15-16), the violation of the rule requiring confrontation "was not cured by the fact that petitioner was attorney of record at the Christianson retrial, since he presumably would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated." Indeed, petitioner did not know and could not have known at the time of Peterson's testimony that it would later be used as proof of the contempt. The order to show cause why he should not be held in contempt was not issued until eleven days after Peterson testified. And it was not until near the end of the contempt hearing (R. 59) that the Government gave any notice that it intended to introduce or rely upon Peterson's testimony.

Even if petitioner had known definitely that contempt proceedings would later be brought against him and had been perceptive enough to anticipate that Peterson's testimony would be introduced as proof of his contempt, petitioner could not have cross-examined Peterson during the course of the criminal trial. Any cross-examination of Peterson at that point would have been ruled out as irrelevant to the conspiracy trial. As the trial court later stated (S.R. 48), the court during that trial was anxious not to permit the jury to learn of the impending contempt matter so that the conspiracy defendants would not be prejudiced thereby. And certainly it was not petitioner's

burden at the contempt trial to call for cross-examination any or all witnesses who had previously testified in the independent criminal proceeding and whose testimony might or might not be considered relevant in determining guilt on the contempt charges.

Petitioner, in short, had the right under Rule 42(b) to be confronted by Peterson at the contempt hearing and to cross-examine him there. And in the words of the court in *Matusow* v. *United States,* 229 F. 2d 335, 347 (C.A. 5), petitioner was entitled to have Peterson's testimony "given in a plenary proceeding at which his attorney had the right of cross-examination." Or, as stated by this Court in *In re Oliver,* 333 U.S. 257, 272, petitioner was entitled at the contempt hearing "to examine the witnesses against him, to offer testimony, and *to be represented by counsel.*" (Emphasis added). Thus, despite the fact that petitioner himself was an attorney, he had the right to have counsel of his own choosing for purposes of the contempt proceeding. The right of cross-examination is normally exercised by one's counsel. And exercising that right through counsel is appropriate here only in the independent contempt proceeding. To attempt to exercise it through counsel in a separate and disconnected criminal trial would be both futile and chaotic.

But the violation of petitioner's due process rights under Rule 42(b) was not limited to the matter of the Peterson testimony. Nor was it confined to the first specification of contempt. The basic failure to keep the contempt hearing separate from the preceding conspiracy trial, the failure of the Government to confront the petitioner with all the elements of proof bearing upon his guilt, and the absence of an oppor-

tunity for petitioner to rebut and cross-examine the evidence and testimony against him were likewise applicable to the second and third specifications of contempt.

The Government, of course, had the burden of proving beyond a reasonable doubt that petitioner disobeyed the two subpoenas, as charged in the second and third specifications. To sustain that burden, the Government was obliged to establish independently the basic elements of such disobedience. And before the burden of proof shifted to petitioner, it was necessary that the Government "shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression". *Morrison* v. *California,* 291 U.S. 82, 88, quoted in *United States* v. *Fleischman,* 339 U.S. 349, 361. In other words, "before the burden of proof may be shifted, the Government's case must be independently established to some extent, and there must be a 'manifest disparity in convenience of proof and opportunity for knowledge'." *United States* v. *Patterson* 219 F. 2d 659, 662 (C.A. 2).

But in this case, the record established at the contempt hearing is devoid of independent proof by the Government of the elements of contempt set forth in the second and third specifications. Petitioner was confronted with no proof of his guilt and he was given no opportunity to rebut or explain such proof. The burden of proof never in fact shifted to petitioner.

Thus the Government made no effort to introduce into the record any of the various documents referred to in the two specifications of disobedience. It offered no proof to establish that these documents were required to be produced pursuant to the two subpoenas. No independent proof was given as to the time when or the circumstances under which these specified documents were seized by the Government so as to establish that they were readily accessible to petitioner. Nor was any reference, let alone proof, made at the hearing as to the court order of March 29, 1954, which the third specification charged him with violating. And as to the records mentioned in the second specification, the Government has now conceded (Brief in opposition to the grant of certiorari, p. 17, n. 7) that "There was no proof that these particular records were actually in existence at the time the subpoena was served."

It was not enough, moreover, that the books and records referred to by specification No. 3 purportedly were on a table in the presence of the court during the pendency of the contempt hearing. The physical presence of such documents and the court's personal assumptions or views as to their existence and the circumstances of their seizure were no substitute for independent formal proof of their existence, their relevance and their accessibility to petitioner. Nor could petitioner's admission that he had not produced these documents pursuant to the subpoena (R. 42-43, 46-54) or his introduction into the record of certain of these documents (R. 59) cancel the Government's burden of offering and confronting petitioner with independent proof of his disobedience.

Petitioner had a right under Rule 42(b) to know precisely how these documents were being used to

demonstrate his guilt under the third specification. That knowledge was essential so that he could have an opportunity to refute and rebut the implications of guilt. And that knowledge could come about only if the Government formally introduced independent proof relating to those documents. The Government's failure to follow such time-honored procedure and its reliance on the trial judge's personal knowledge effectively deprived petitioner of an opportunity to present an effective defense.

The defective procedure followed at the contempt hearing was highlighted by what transpired subsequently in the Court of Appeals. Clearly recognizing the deficiencies in the record compiled at the contempt hearing, the Government prepared and submitted to the Court of Appeals a supplementary record containing many matters which had not been introduced at the contempt trial. This was an obvious acknowledgement that petitioner's contempt conviction could not be sustained by reliance only on the formal record made at the contempt proceeding.

In sustaining petitioner's conviction, the Court of Appeals relied heavily on evidence and testimony with which petitioner had not been confronted at the contempt hearing. Thus in its affirmance of petitioner's guilt as to the first specification of false and evasive testimony, the Court of Appeals referred only to testimony given in the prior conspiracy trial. "It was the evidence adduced at the *Christianson* trial," said the court, "particularly that of Agent Peterson, which showed that Nilva's testimony was false." S.R. 77-78, 227 F. 2d at 78. And as evidence of the willfulness of petitioner's testimony and his knowledge of Mayflower's records, the court pointed to the testimony of

one James Christensen in the prior conspiracy trial. S.R. 76, 227 F. 2d at 77.

The Peterson testimony, as has been shown, was received over petitioner's objection at the contempt trial in the form of a transcript without any opportunity on petitioner's part to cross-examine Peterson And the Christensen testimony was not even referred to during the course of the contempt hearing. That testimony is found only in the supplementary record (S.R. 36-37) and was one of the items which the Government included as an afterthought when the case was on appeal.

Moreover, the Court of Appeals sustained the conviction as to the second and third specifications with the remark that "His failure to produce records called for by the subpoenas was demonstrated by their subsequent production under the impounding order." S.R. 80, 227 F. 2d at 79-80. Such a remark could have been made only by reference to the supplementary record, for there was no demonstration in the record compiled at the contempt hearing that the records were produced under the impounding order. Indeed, this remark is totally incorrect as to the records specified in the second specification. The Government has conceded—again by reference to the supplementary record—that there was no proof that these particular documents were in existence at the time the subpoena was served or at the time of trial. And there was no proof even in the supplementary record that these items mentioned in the second specification had been seized under the impounding order.

The entire contempt proceeding was thus infected with due process violations. The petitioner was not confronted with the witnesses against him nor afforded

the opportunity of cross-examination. The Government's case rested not on evidence introduced at the contempt hearing but largely on the trial judge's personal views as to the events preceding the contempt hearing. The trial court made no effort to insist that the contempt proceeding be plenary in nature and one in which the Government had the burden of proving by independent evidence that petitioner was guilty of contempt beyond a reasonable doubt. These serious deficiencies were compounded by the action of the Court of Appeals in sustaining the conviction by reference to evidence that was either not produced in any form at the contempt hearing or that was produced in a manner which deprived petitioner of the right to have it produced "in a plenary proceeding at which his attorney had the right of cross-examination." *Matusow* v. *United States*, 229 F. 2d 335, 347 (C.A. 5).

Such gross violations of petitioner's rights under Rule 42(b) call for an unqualified reversal of the judgment below. Only in that way can petitioner be vindicated for the loss of an opportunity to be heard in his defense and to examine the witnesses against him—the loss of his right, in short, to his day in court. *In re Oliver*, 333 U.S. 257, 272.

2. RULE 42(a) WAS INAPPLICABLE TO THIS PROCEEDING AND COULD NOT OPERATE TO DIMINISH THE RIGHTS ACCRUING UNDER RULE 42(b).

Despite the fact that the contempt proceeding against petitioner was premised in the trial court exclusively on Rule 42(b) of the Federal Criminal Rules, the Court of Appeals stated in its opinion denying the petition for rehearing (S.R. 99, 228 F. 2d at 135) that the trial court "could, we think, properly have proceeded summarily against Nilva for contempt under

Rule 42(a) of the Federal Rules of Criminal Procedure.'"[7] The fact that the District Court chose to proceed under Rule 42(b), said the Court of Appeals, did not place petitioner in any stronger position with respect to the admission of evidence to substantiate the charge that his conduct constituted contempt than he would have been in had he been proceeded against under Rule 42(a), although it gave him a better opportunity to defend against the charge." S.R. 100, 228 F. 2d at 136. Hence he could not "complain that he was proceeded against under the more favorable rule."

In effect, the Court of Appeals held that since the petitioner might have been subjected to summary procedure under Rule 42(a), he was in no position to object to any procedural irregularities or deficiencies in the admission of evidence against him. The fact that he was subjected to a Rule 42(b) proceeding gave him no greater right to procedural due process as to the evidence against him than if he had been the subject of a Rule 42(a) proceeding. Rule 42(b), in other words, operated only to give him "more adequate opportunity to produce evidence in explanation, exculpation or mitigation of his conduct."

This holding in the opinion on rehearing was more than mere dictum. It was the *ratio decidendi* underlying the court's entire approach to petitioner's due process rights under Rule 42(b). It serves to explain the summary rejection given in the court's original

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[7] The District Court was also of the same view. Thus, in the contempt proceeding, the trial judge stated (R. 30): "I think in this instance the Court could have, if it desired, proceeded under paragraph (a) of Rule 42 summarily without giving any time at all." But the judge did not certify, as required by Rule 42(a), that he saw or heard the conduct constituting the contempt and that it was committed in his actual presence.

opinion to many of petitioner's claims that the procedural requirements of Rule 42(b) had not been followed and that he had been denied a fair trial. See S.R. 80-81, 227 F. 2d at 79-80. It also demonstrates why the Court of Appeals failed to recognize that the introduction of the Peterson testimony in the form of a transcript presented a serious question.

The court's belief that Rule 42(b), in a situation where Rule 42(a) is thought to be applicable, has no due process impact on the prosecution of a contempt was premised on the assumption that the conduct of petitioner found to have been contumacious and obstructive was committed wholly within the presence of the trial judge. "It was the conduct of Nilva which occurred in the presence of the District Court and the evidence introduced relative thereto during the trial of Christianson and Paster," said the Court of Appeals, "which resulted in the subsequent contempt proceeding against Nilva." S.R. 99; 228 F. 2d at 135.

The assumption that Rule 42(a) was applicable to this case has no merit in law or fact. Even the Government now concedes (Brief in opposition to grant of certiorari, p. 16) that it is "very doubtful that the contempts charged here could have been dealt with summarily under Rule 42(a)." Rule 42(a) is concerned only with matters of decorum and conduct occurring wholly within the courtroom or in the immediate vicinity of the court. It contemplates only "that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial." *Sacher* v. *United States*, 343 U.S. 1, 9. And those occasions are limited to those involving "misbehavior in the vicinity of the court disrupting to quiet and order or actually

interrupting the court in the conduct of its business." *Nye* v. *United States,* 313 U.S. 33, 52. See also *Cooke* v. *United States,* 267 U.S. 517, 539; *In re Oliver,* 333 U.S. 257, 274; *In re Michael,* 326 U.S. 224, 227; *In re Murchison,* 349 U.S. 133, 137; *Matusow* v. *United States,* 229 F. 2d 335, 341-342 (C.A. 5).

In this case, of course, none of the allegedly contumacious acts occurred in the presence of the trial judge in such a manner as to disrupt the decorum or order of the court. As to the first specification of giving false and evasive testimony, it was not enough that such testimony—as well as other testimony thought to demonstrate or bear upon the issues of falsity and evasiveness—was given before the trial judge. The facts which bore upon the contumacious nature of petitioner's testimony were all matters which occurred outside the presence of the trial court. Those facts related to the presence or absence of the records of the Mayflower Distributing Co. at its place of business in St. Paul, Minn., and the nature and good faith of petitioner's search of those records in St. Paul. These were matters which the trial judge could not certify as having been seen or heard by him or as having taken place in his actual presence, as required by Rule 42(a). See *Matusow* v. *United States,* 229 F. 2d 335, 340-341 (C.A. 5); *Bowles* v. *United States,* 44 F. 2d 115 (C.A. 4).

Nor could such a certification have been made as to the facts constituting the subject matter of the second and third specifications of contempt. The alleged failure to bring in certain records required by the two subpoenas related to action or inaction by the petitioner which did not occur within the immediate presence of the trial judge so as to violate the quiet

and order of any judicial proceeding.[8] The summary processes of Rule 42(a) thus could not have been brought to bear upon the assertedly contumacious disobedience of the subpoenas.

The inapplicability of Rule 42(a) to this case is plain. But even if the summary procedure of that rule was applicable to these circumstances, the fact remains that the trial court did not invoke Rule 42(a) in prosecuting petitioner for contempt. Thus all the due process connotations of Rule 42(b) became available to petitioner. The requirements of all the due process rights expressed and implied in Rule 42(b) could not be diminished by the applicability of a summary procedure under Rule 42(a) which the trial court elected not to pursue.

In other words, Rule 42(b) does not suddenly lose any of its due process requirements merely because Rule 42(a) might have been but was not employed. To hold, as did the court below, that the uninvoked availability of Rule 42(a) means that a Rule 42(b) proceeding protects the defendant only in his right to present a full defense, while depriving him of all due process protections as to the evidence submitted against him, is both unwarranted and unfair. Rule 42(b) affords a full measure of due process that cannot be diluted in such a manner.

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[8] Indeed, 18 U.S.C. § 401 makes it plain that by definition the disobedience of a subpoena, which is punishable under clause (3) of that statute, is unrelated to "misbehavior of any person in its [the court's] presence or so near thereto as to obstruct the administration of justice," which is punishable under clause (1) of the statute.

3. THERE WAS A COMPLETE ABSENCE OF COMPETENT EVIDENCE TO SUSTAIN THE CONVICTION

a. First specification.

While the court below recognized that a contempt defendant can be found guilty only on proof beyond a reasonable doubt, the court failed to look for or to find the existence of any competent evidence from which it could be concluded beyond a reasonable doubt that petitioner had given false and evasive testimony as charged in the first specification. Indeed, not only was there an absence of such competent evidence but the record affirmatively shows petitioner's innocence.

The court below misconceived the nature of petitioner's testimony which it found to be false and evasive. And it was thereby led to misconceive the nature of the competent evidence which was necessary to sustain the Government's burden of proof. The court stated that petitioner had sworn that he made a diligent search of the Mayflower records and that "the records he produced were all of the records of purchases except the records which were on file in the United States Court of Appeals in the Minnesota case." S.R. 74; 227 F. 2d at 78. The court found, moreover, that justice was obstructed by petitioner's testimony "that the records he produced and those which were in the Court of Appeals were the only records in existence relating to the subject matter he was examined about." S.R. 80; 227 F. 2d at 79.

But as previously noted, *supra*, p. 7, petitioner never in fact testified that he had brought all the records except those on file in the appellate court. He stated merely that he had searched through thousands of records, with the aid of office employees, and had brought those which to the best of his knowledge and

ability were required and available. He readily admitted that he may not have examined certain records, a fact of particular relevance in light of his lack of knowledge of bookkeeping methods and of the contents of specific records. See R. 8-20.

Evidence that there were in fact records not on file in the appellate court and which were not produced by petitioner as required—assuming such evidence was actually introduced into the contempt record—was thus inadequate to prove the falsity or evasiveness of petitioner's testimony. The falsity of such testimony could only be shown by evidence that petitioner did not make a diligent search to the best of his ability and that the records which he admittedly did not bring were withheld in order to frustrate the orders of the court.

There was, however, no evidence whatever contradicting the testimony of petitioner. As petitioner reiterated at the contempt hearing (R. 54), "I produced such items as I could find and that I was told that the Government was interested in in connection with the main lawsuit." There is not one word of testimony by any witness in the conspiracy trial—even assuming such testimony to be admissible—which denies that petitioner made a diligent search within his capacities or that he intentionally held back any records he knew should have been produced. Indeed, the testimony of Peterson and the other conspiracy trial witnesses on which the court below relied was necessarily confined to the issues involved in that trial. Those witnesses were not concerned with or asked about the truth or falsity of petitioner's testimony, a matter which the trial judge said he wanted to keep from the jury. S.R. 48.

Moreover, even if there had been sufficient evidence to demonstrate the falsity or evasiveness of the testimony petitioner actually gave on April 1, there was no proof that such testimony was so clearly obstructive of justice as to fall within the prohibited realm of contempt. The trial judge apparently felt (S.R. 49) that the essential ingredient of obstruction came "from the fact that it became necessary to expend time and expense to impound the records pursuant to the Court's order," which records were "necessary and vital to the trial of U.S. v. Christianson, et al." And the Court of Appeals likewise found obstruction in the fact that "his conduct did necessitate a delay in the Christianson case" and that the obstruction was overcome only "by the impounding of the records, their tedious and laborious examination and their transportation to the place of trial." S.R. 80; 227 F. 2d at 79.

But as the Government has virtually conceded in its brief in opposition to certiorari (pp. 16-17), such an obstruction was one that flowed from the non-production of the books and records called for by the subpoenas rather than from the testimony itself. Considered apart from the non-production, the allegedly false and evasive testimony did not possess the critical element of "obstruction to the court in the performance of its duty," *Ex parte Hudgings,* 249 U.S. 378, 383. The judicial processes were not impeded or halted by the testimony as such. In fact, the testimony convinced the trial judge that an impounding order should be entered forthwith and the entry of that order and its execution constituted unimpeded judicial procedures.

Whatever labor or expense was involved in the examination of the impounded records and whatever delay was necessitated in the Christianson-Paster trial were

the direct consequences of the failure to produce the records pursuant to the two subpoenas. Even had petitioner never testified or had the trial judge been convinced that petitioner had given truthful testimony, the impounding order, with the ensuing labor, expense and delay, would presumably have been necessary if the records so impounded were to be made available. And even had petitioner admitted that he had disobeyed the subpoenas, the same impounding would have been necessary. Hence the testimony itself can retain at most the mark of perjury, a mark which was evident to the trial judge only after the records were impounded and Peterson testified as to their contents. See S.R. 48. There was no clear showing of any obstruction beyond that which adheres to any perjured relevant testimony.

As this Court has consistently held, "in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty." *Ex parte Hudgings*, 249 U.S. 378, 383. See *In re Michael*, 326 U.S. 224, 227-229. In this case there was lacking clear proof not only of perjury but of any obstruction to justice that resulted from the questioned testimony. Quite clearly, then, petitioner's conviction under the first specification of contempt cannot stand.

b. Second specification.

There was an obvious and admitted lack of evidence to sustain the conviction on the second specification, the alleged disobedience of subpoena No. 78 in not producing five specific items. "There was no proof that these particular records were actually in existence at

the time the subpoena was served." Brief of the Government in opposition to certiorari, p. 17, n. 7. Nor was there any proof that these five items were actually required to be produced under the terms of subpoena No. 78.

The fact that the Government's concession in this respect grows out of testimony "which was not introduced at the contempt hearing but which was referred to by the Court of Appeals" serves anew to emphasize the procedural inadequacies which marked the contempt hearing. At the hearing itself there was practically no mention, let alone proof, of the alleged disobedience of subpoena No. 78. The Government neither sustained its burden of proof nor confronted the petitioner with the evidence against him.

c. Third specification.

In its brief in opposition to certiorari, the Government sought to sustain the petitioner's conviction on the basis of the third specification alone, the specification that petitioner had disobeyed subpoena No. 160. It was said that the general sentence of a year and a day could be sustained "in view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3" and hence "the main issues raised by the petitioner are not really in this case and need not be considered by the Court." Brief, p. 13.

But as was pointed out in petitioner's reply brief in response to the Government's brief, such a contention is without merit. The doctrine relied upon by the Government is to the effect that a general verdict or judgment in a criminal case on an indictment containing several counts cannot be reversed if any one of the counts is good and warrants the sentence im-

posed. *Claasen* v. *United States*, 142 U.S. 140, 146-147; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, n. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85. But this doctrine, which stems from the presumption that the court awarded sentence on the good count only, is clearly inapplicable where, as here, the record demonstrates that the sentence was imposed without reference to any particular count or specification.

Petitioner here was found "guilty of criminal contempt as set forth in the Order to Show Cause insofar as the three specifications therein are concerned" (R. 67), and the sentence of imprisonment for a year and a day was imposed without reference to or without being broken down as to any particular specification (R. 67). Having found petitioner guilty of three separate acts of contempt, the court consolidated the sentence without indicating how much of the punishment was imposed for any particular contemptuous act. It thus cannot be presumed that the sentence was imposed solely on the basis of the third specification or that the first two specifications were ignored by the trial judge in imposing the sentence. But for the finding of guilt as to either or both of the other two specifications, the sentence imposed might have been less severe.

Under these circumstances, the judgment must be reversed if it appears that any one of the three counts is defective in law or in proof. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 440; *Stromberg* v. *California*, 283 U.S. 359, 368; *Williams* v. *North Carolina*, 317 U.S. 287, 291-292. Thus the third specification of contempt cannot be considered as the sole issue in the case as it reaches this Court. This case necessarily involves all three specifications and the various issues raised as to all of them.

But even considering the third specification by itself, the conviction based upon that specification cannot be sustained. As already indicated, the Government made no effort to prove that any of the records itemized in the specification were pertinent and within the plain reach of subpoena No: 160, or that the records were in existence and were readily accessible to petitioner at the time the subpoena was returnable. See *supra*, p. 32. Nor was there any proof that petitioner violated the court order of March 29, 1954, as found by the trial court (R. 66, insert page) in its judgment and commitment. Not the slightest attempt was made by the Government to introduce this court order or any of the specified items into the record of the contempt case. No attempt was made, in short, to present independent proof of the third specification of contempt or to confront petitioner with that proof so that he could rebut it. All was made to depend upon the judge's own recollection of events and upon his observation of records physically present before him on a table but not formally identified and introduced into the contempt hearing record. Obviously such a conviction cannot stand.

The Government, however, seeks to sustain the finding of guilt as to the third specification by reference to petitioner's admissions as to non-production and the asserted but unproved physical presence of the records before the court at the contempt hearing, thereby making out "a prima facie case of willful disobedience of the order of the court as to constitute contempt under 18 U.S.C. 401 and willful non-compliance with the subpoena under Rule 17(g) F.R. Crim. P." Brief in opposition to certiorari, p. 12. The contention is made that it then became petitioner's burden to go forward with his proof that his disobedience was with

"adequate excuse" and that such a burden was not discharged by his testimony that he could not find the records, that he did not think there were such records, and that he produced whatever he was able to find (R. 48-50, 52-54, 58). His failure to make a good faith search is said to be shown from the fact, as observed by the court below, that "practically all of the records called for by the subpoenas were later found when the records were impounded and examined." S.R. 80; 227 F. 2d at 80.

Apart from the fact that the Government did not make independent proof of petitioner's disobedience or introduce into the record any of the documents physically present before the court, it seems apparent that the petitioner by his unchallenged testimony did sustain his burden of going forward with proof that the non-production was with "adequate excuse". The unproved assertion that the records were later found when they were impounded does not necessarily demonstrate the absence of a good faith search by petitioner. Each case must be adjudicated on its own circumstances. And the ciremstances revealed by this record do not negate the truth of petitioner's testimony.

The Government suggests that the standard of proof of an "adequate excuse" is proof of the non-existence or unavailability of the records demanded by the subpoena. A good faith search for records which are in fact in existence and available thus becomes a contradiction in terms. If records that are in existence and are available are not in fact produced, there can be no "adequate excuse" in terms of a good faith search. But there are several factors present in this case which make the application of such a rigid standard of proof both unreasonable and unrealistic:

(1) Subpoena No. 160, like subpoena No. 78, was not directed to the petitioner but to the Mayflower Distributing Co. R. 2, 3, 24, 26.

(2) These subpoenas were not served upon petitioner but upon Walter D. Johnson, the secretary-treasurer of the Mayflower Distributing Co. R. 25, 27-28. And petitioner understood that it was Johnson's duty to compile the records and comply with the subpoenas. R. 41. Petitioner attempted to find the records and to respond to the subpoenas only after having been requested to do so by Johnson. R. 41-42.

(3) These subpoenas called for the production of documents of the Mayflower Distributing Co. of which petitioner was not the custodian. Petitioner was, in the language of the trial court, but a "nominal vice president of the Mayflower Distributing Company." S.R. 48. As petitioner himself explained (R. 39), he was employed by Mayflower in a legal capacity and "handled minor legal matters, collection matters, contracts, leases, things of that nature." He was not an accountant. R. 43. His status as vice president was but a nominal one and he could in no sense be considered the custodian of the corporate records.

(4) There was clear evidence available that Herman Paster, the sole stockholder and president of the Mayflower Distributing Co., had not only direct but exclusive control and possession of the books, records and documents of that corporation. S.R. 24-25.

(5) The subpoenas were both in broad terms in the sense that they called for the exercise of judgment on the part of the person responding thereto as to which specific documents and papers had to be supplied. The subpoenas themselves did not itemize specific records

but merely called for general categories of documents, necessitating in many instances an intimate knowledge of the bookkeeping and accounting records of the corporation. See R. 24-27.

Under these circumstances, where there is no allegation, proof or finding that petitioner was the custodian or had control of the documents not produced, and where it appears that someone else was the sole custodian, it is fair to put on petitioner the burden of producing only what he in good faith was able to find. Especially is this true since the subpoenas were not directed to him personally and there was no order of the court directed to him personally. As noted in *Wilson* v. *United States,* 221 U.S. 361, 374, 376,

> Where the documents of a corporation are sought, the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena duces tecum should not be directed to the corporation itself. Corporate existence implies amenability to legal process. . . . A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

See also *United States* v. *Fleischman,* 339 U.S. 349, 357-358.

The subpoenas here were directed to the Mayflower Distributing Co. and were thus, in the words of the *Wilson* case, commands only "to those who are officially responsible for the conduct of its affairs." Or, as

stated in 8 Wigmore on Evidence (3rd ed.), Sec. 3200, p. 120,

> When the documents desired are those of a corporation, it would seem that the subpoena may be directed to the corporation, but its officer who is their custodian is the proper person to hold liable for non-production.

In other words, absolute liability for non-production of corporate records that are in fact in existence and available seems to be limited to those officers who are the custodians of the records and who are officially responsible for the conduct of the corporate affairs. Thus in the *Wilson* case, the subpoena was directed to the corporation and was served on and responded to by its president, who had possession and control of the records. In *Lapiparo* v. *United States,* 216 F. 2d 87 (C.A. 8), the defendant whose conviction for contempt for failure to produce corporate records was sustained was the president of the corporation, not a mere nominal officer, and was the owner of some 48% of its common stock. This relationship was held to justify the conclusion that he controlled the corporate records. And see *People* v. *Rezek,* 410 Ill. 618, 628-629, 103 N.E. 2d 172, 132, where the fact that the defendants were the responsible officers of the corporation was held to outlaw a denial of their knowledge of the whereabouts of the corporate records.

On the other hand, where the person responding to the subpoena has been shown not to be officially responsible for the custody or control of an organization's records, contempt liability for good faith non-production has not been imposed. In *United States* v. *Patterson,* 219 F. 2d 659 (C.A. 2), a conviction for contempt was reversed for want of proof that the docu-

ments not produced were within the power and control of the defendant. And in *Bank of Utica* v. *Hillard*, 5 Cow. 153, 158 (N.Y.), the court stated that,

> The obligation of Colling [the bank clerk] to produce the [bank books] upon the "duces tecum" depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in or possession of the books as imposed the obligation to bring them.

Here the petitioner was but the nominal vice-president of the Mayflower Distributing Co., an officer whose duties were almost exclusively legal in character. He could not properly be described as the official custodian of the corporate records nor as one who is officially responsible for the maintenance of the records. He was, in relation to the records, not unlike the bank clerk in *Bank of Utica* v. *Hillard, supra,* who was held not to have such property in or possession of the books as imposed on him an absolute obligation to bring all available records beyond what he in good faith could find.

It is true that petitioner appeared at the April 1 hearing "in answer to the subpoena that was issued by the Government to produce the records." R. 8. Such an appearance clearly subjected him to a duty to testify truthfully and to conduct himself in the presence of the court without contempt. But it could not make him other than a nominal officer who lacked custody over the corporate records. Nor could such an appearance convert the commands of the subpoenas directed to the corporation into commands directed to him personally. Under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena is a com-

mand only "to the person to whom it is directed," a limitation on the substantive effect of the subpoena which cannot be changed by a voluntary appearance.

Significantly, the trial judge did not use the occasion of petitioner's voluntary appearance as a basis for ordering petitioner to produce the documents. Instead, the documents were ordered impounded. But there was no order directed at petitioner which he disobeyed and there is no charge that he interfered in any way with the execution of the impounding order.

Petitioner, in short, should not be held to be the insurer of obedience by the corporation of the subpoenas directed to the corporation and served upon its secretary-treasurer. It was for the corporation's failure to obey the subpoena served on the corporation that petitioner has been found guilty of contempt. Such a result is unconscionable where there is lacking any indication that petitioner is other than a nominal officer without custody or control over the corporate books. The standard of a voluntary attempt on his part to answer for the corporation should be his good faith within the scope of his knowledge of the corporate records and his ability to comprehend the technical details of those records. A good faith search on his part should constitute an "adequate excuse" within the meaning of Rule 17(g) of the Federal Rules of Criminal Procedure.

Here there was convincing and undenied testimony of petitioner's good faith attempts to find and to produce what he thought the broadly-worded subpoenas demanded. Some of the records he could not find were so "buried" in the basement that not even the federal agents could find them in executing the impounding order without the aid of the corporation's president,

who had knowledge and custody of the records (R. 49, 52).

This Court has said that when "a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena". *United States* v. *Bryan*, 339 U.S. 323, 332. There was far more than a modicum of good faith proved in this case, however. There was unchallenged testimony that petitioner did all he could within his limited knowledge of the corporate records to comply with the two broadly-worded subpoenas. His good faith efforts to comply should therefore be viewed as adequate refutations of the second and third specifications of contempt. And, conversely, the record is barren of proof beyond a reasonable doubt that petitioner wilfully disobeyed the two subpoenas.

4. OTHER ERRORS WARRANT REVERSAL OF THE JUDGMENT BELOW

a. The supplementary record.

The court below committed plain error in denying petitioner's motion to strike those portions of the supplementary record which had not been incorporated by reference or otherwise introduced into the record of the contempt case. S.R. 69-72. As stated in *United States ex rel. Collins* v. *Ashe*, 176 F. 2d 606, 607 (C.A. 3),

> It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that the appellate tribunal cannot base an adjudication on items of evidence informally offered in the trial

court and, though apparently read by it, not made a part of the record.

Moreover, the supplementary record not having been presented to the trial court for inclusion in the record, the Court of Appeals lacked authority to add it to the record and to consider it in reviewing the action of the trial court. *Heath* v. *Helmick,* 173 F.2d 156 (C.A. 9); *Washington* v. *United States,* 14 F.R.D. 221 D.C. Ky.).

b. Time for preparation.

The trial court erred in denying petitioner sufficient time in which to prepare his defense. Under Rule 42(b), one accused of criminal contempt is entitled to "a reasonable time for the preparation of the defense." While the reasonableness of the time allowed will vary from case to case, the facts here (see p. 11, *supra*) demonstrate that the four days allowed, including a weekend, to permit petitioner to secure counsel and to enable that counsel to familiarize himself with the case and prepare an adequate defense were entirely insufficient.

This case involved multitudinous documents and a careful study of petitioner's questioned testimony and the events relating thereto. The Government suggests (Brief in opposition to certiorari, pp. 13-14, n. 1) that there was adequate time to prepare a defense since the alleged contempt was committed on April 1, since he was put on notice "that his misconduct had been discovered" when the records he failed to produce were impounded, and since on April 15 he promised not to leave the court's jurisdiction without permission. Hence it is said that the four days between the issuance of the order to show cause on April 23 and the

hearing on April 27 were not unreasonably short under the circumstances.

But however many indications the trial judge may have given that he was going to charge petitioner with contempt, it was not until April 23 that the court gave actual notice of the contempt charges. It was not until then that petitioner could have known the precise nature of the charges and what documents he allegedly failed to produce. Prior to April 23, it would have been impossible for petitioner or his counsel to have begun meaningful preparations for defending charges which had not yet been specified.

Four days were all that were available. But due process under Rule 42(b) required that more than four days be allowed to answer so serious and complicated a set of charges as here involved. See *United States* v. *Aberbach*, 165 F.2d 713, 714 (C.A. 2), ten days held reasonable; *United States* v. *McGovern*, 60 F.2d 880, 882 (C.A. 2), six days given to answer.

c. The Peterson testimony.

The trial court erred in admitting and considering the transcript of testimony by Richard N. Peterson for the additional reason that such transcript, assuming it to be otherwise admissible in the trial proceeding, involved a mere summation and tabulation made from voluminous records seized from the Mayflower Distributing Co. Unless it could be shown—as it was not—that the original records were destroyed or were otherwise unavailable, the records themselves are the primary evidence of their own existence. Where, as in the contempt proceeding, the existence of the documents is a prime issue, testimony about the documents

is secondary and explanatory only. See 4 Wigmore on Evidence (3rd ed.), §§ 1192, 1244(4).

Most of the documents which petitioner failed to produce were assertedly on a table in the presence of the court during the contempt trial. But the Government made no effort to introduce any of them into the record, making the introduction of the Peterson transcript all the more inexcusable. Moreover, since the Peterson testimony was not introduced until near the end of the contempt hearing, petitioner had no adequate opportunity to check the voluminous documents against Peterson's testimony for inaccuracies and to call Peterson as a witness at the hearing. There had been no prior indication that Peterson's testimony was as all relevant or would be used to prove the existence of the records.

d. The scope of the subpoenas.

Subpoenas No. 78 and No. 160, in calling for the production of "all" records of shipments of "merchandise, parts or units of coin-operated amusement devices or gambling devices" (R. 27) or "all slot machines, flat-top or console, coin-operated device, whether new or used" (R. 25) between certain dates or pertaining to dealings with named individuals, were obviously not intended to produce only evidentiary materials but were "fishing expeditions" to see what might turn up. The Johnson Act, 15 U.S.C. § 1171, which was the basis of the Christianson-Paster criminal proceeding, deals only with "gambling devices" as therein defined and has no impact on "merchandise" or "coin-operated amusement devices" such as were mentioned in the subpoenas. The subpoenas thus called both for materials which the

Mayflower Distributing Co. was bound to produce and for materials which it was not bound to produce.

In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221, this Court held that one should not be held in contempt for disobedience of one clause of a subpoena which called for the production of all documents "relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." The fatal defect in this clause was that it was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up." The clause was therefore held invalid. This Court further added (p. 221):

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

And so in this case, the two subpoenas indiscriminately called for the production of documents without regard to their evidentiary value or their pertinence under the Johnson Act. The burden was thrust upon the petitioner to cull the good from the bad and to risk a judgment as to whether any or all of the requested documents were evidentiary or pertinent materials. And there was no proof whatever at the contempt trial that any of the documents requested under the subpoenas and specified in the order to show cause were evidentiary in nature or were in any way relevant to the Christianson-Paster conspiracy trial. The *Bowman Dairy* case makes clear that petitioner cannot be held in contempt under such circumstances. The

ruling to the contrary by the court below was erroneous.

e. The excessive sentence.

The trial court plainly abused its discretion in sentencing petitioner to imprisonment for a year and a day. In view of the entire record and the nature of the offenses charged, the sentence was excessively severe.

Petitioner, as has been noted, was not the person to whom the subpoenas were directed. Despite the fact that he was but a nominal officer and was not the official custodian of the corporate records, he voluntarily appeared in response to the subpoenas addressed to the Mayflower Distributing Co. He made a good faith effort to comply with the subpoenas within the limited scope of his knowledge of the records. And upon him was put the burden of trying to understand and apply the broad language of the subpoenas, language that did not call for specific items and language which did not distinguish between the relevant and the non-relevant or the evidentiary and the non-evidentiary. He was forced to make his own judgments as to what the subpoenas meant and precisely what records were to be produced.

Yet there is no indication that petitioner failed to produce any document specifically requested, that he disobeyed any order directed to him personally, or that he failed to cooperate with the court when requested to do so. There is no possible ground for concluding that the petitioner deliberately and flagrantly violated the court's commands. His mistakes or failures occurred in good faith.

The sentence imposed upon petitioner was undoubtedly influenced by the trial court's feeling that peti-

tioner's record was not unblemished in that he had been a defendant in the first trial of the criminal conspiracy case. "Had he been a defendant in the case as it was tried this time," said the court, "I don't think he would have been so fortunate." S.R. 45. Sentence was imposed soon after this remark was made.

Under these circumstances—and particularly in view of the trial court's obvious feeling that petitioner would have been convicted and imprisoned had he not been acquitted at the first trial—the sentence of a year and a day was excessive. That excessiveness is not lessened by the fact that petitioner was an attorney. It was not in his status as an attorney, but rather in his actions as a nominal officer of a corporation, that he was charged with contempt of court. In no similar reported contempt case has such a long sentence been imposed or sustained. See *Sacher* v. *United States*, 343 U.S. 1 (six month's sentence); *Offutt* v. *United States*, 348 U.S. 11 (ten days' sentence reduced by Court of Appeals to forty-eight hours); and see *United States* v. *Patterson*, 219 F.2d 659, 660 (C.A. 2).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed in its entirety.

Respectfully submitted,

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